

Highland Foods, Inc. and Vickelda Industrial Corporation and Local 5, Butchers, Food Handlers, Allied and Miscellaneous Workers Union, affiliated with United Food & Commercial Workers International Union, AFL-CIO-CLC. Case 3-CA-9335

April 20, 1981

DECISION AND ORDER

On June 26, 1980, Administrative Law Judge Almira Abbot Stevenson issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge and to adopt her recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Highland Foods, Inc. and Vickelda Industrial Corporation, Highland, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

¹ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing her findings.

DECISION

STATEMENT OF THE CASE

ALMIRA ABBOT STEVENSON, Administrative Law Judge: This case was heard in Poughkeepsie, New York, on March 5 and 6, 1980. The original charge was served on the Respondent on September 21, and the amended charge was served October 1, 1979. The complaint was issued October 19, 1979 and was thereafter amended. The Respondent duly answered the complaint and the amendments to the complaint.

The issues are whether or not the Respondent violated Section 8(a)(1) of the National Labor Relations Act by isolating Richard Rosenquist from the other employees because of his organizational activities, by threatening to close the plant and discharge employees if they did not refrain from union activities, and by promising benefits if employees would refrain from such activities; and whether or not the Respondent violated Section 8(a)(3) of the Act by laying off Richard Rosenquist because of his or-

ganizational activities.¹ For the reasons stated below, I conclude that the Respondent violated the Act substantially as alleged in the complaint.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. UNFAIR LABOR PRACTICES²

A. Introduction

The Respondent is engaged in machine packaging of food products such as ketchup and sugar in paper or metal packets of various sizes. Elda Gutierrez is vice president of Highland Foods, Inc., and president of Vickelda Industrial Corporation, owning shares in both. She directly supervises the approximately 20 operators, most of whom are women, of the production machines which measure and package the food. Dennis Borrello is part owner of Vickelda, and is machinist, head mechanic, and in charge of maintenance and the three or four men employees who are the machinist, mechanic, printer, and warehouseman. Charlotte Quinn is the one-person office force, and Dianne Altieri is in charge of quality control and relays production orders from Gutierrez to the machine operators, calls breaktime, and operates a production machine. The plant is not organized, and no grievance procedure is in effect.

The Respondent hired Richard Rosenquist in early 1978. He was a friend of Borrello who had been his supervisor when both were previously employed by another company where Borrello knew Rosenquist was a member of the Union. Rosenquist was assigned chiefly to work in the Respondent's machine shop as a machinist, building machines and parts for use on the production floor. In addition, he spent about 10 percent of his time as a mechanic, making relatively minor repairs to machines and performing nonskilled duties on the production floor;³ he also performed printing work for about 2 months in the spring or summer of 1979 after the printer quit, and he received a compliment from Gutierrez for this work.

In May 1979 Rosenquist demanded a \$1-an-hour wage increase. Gutierrez approved 75 cents, telling him he might earn the rest by overtime if available, because, both Gutierrez and Borrello testified, Rosenquist was valuable to them as a machinist and Gutierrez testified they did not want to lose him.

For 2 or 3 weeks beginning in mid-July 1979, Rosenquist sounded out the Respondent's employees, speaking to about 10 of them about their attitudes toward union-

¹ No issue was presented with regard to jurisdiction or labor organization status. I find, based on the allegations of the complaint and the admissions of the answer, that the Respondent is a single integrated business enterprise and meets the jurisdictional standards of the National Labor Relations Board; and that the Union is a labor organization within the meaning of Sec. 2(5) of the Act.

² Except where specifically discussed, the facts are substantially undisputed.

³ Based primarily on the testimony of Dianne Altieri, as I cannot credit Rosenquist's testimony that he spent more, or Borrello's that Rosenquist spent less, time on machinery repair. The weight of the evidence establishes, contrary to Rosenquist's testimony, that he was not a fully qualified mechanic or printer, and that he drove a truck on only one occasion for the Respondent.

ization, and Borrello acknowledged that he heard gossip that Rosenquist "was trying to get people together" for a union.

Rosenquist made an appointment to meet two representatives of the Union on August 8 at a diner some distance from the plant. By coincidence Borrello came into the diner, spoke with one of the union representatives who mistook him for Rosenquist, and on his way out informed Rosenquist that the union representative was waiting to see him inside the place. Upon his return to the plant, Borrello recounted the incident to Gutierrez.

B. Violations of Section 8(a)(1)

1. The complaint alleges in effect that on August 8, 1979, the Respondent isolated Richard Rosenquist from other employees to discourage union activity.

About half an hour after Rosenquist returned from lunch on August 8, the day he met the union representatives at the diner, to the knowledge of Borrello and Gutierrez, Borrello went into the machine shop and told Rosenquist to stay in the machine shop and not go out on the production floor where he had no business going. Borrello also told Altieri to instruct the production employees to stay out of the machine shop and, if they needed tools, they were to stop at the door and ask Rosenquist for them. Altieri did as she was told.

Until this time, Rosenquist occasionally went onto the production floor for various reasons, and employees came into the shop frequently to get tools for Borrello and Altieri.

Borrello and Altieri testified that although this rule had been announced on previous occasions it had not been, and still is not, observed or enforced. Borrello testified he restricted Rosenquist to the machine shop because his only job was that of machinist and that was where his machinist work was and it was uneconomic to use Rosenquist, at his high wage rate, to perform unskilled work such as carrying rolls of paper into the production area and dumping sugar into a hopper. He restricted access to the machine shop by production employees because, he said, employees failed to return tools they carried out of the shop and Rosenquist had complained about it, and because it took Borrello a long time to find a tool an employee had left in the warehouse. Altieri added that employees were beginning to use the machine shop, which had a back door, as an exit from the plant instead of going out through the office area.

Altieri's justification for the announcement, or reannouncement, of this rule at this time—to prevent employees from using the shop area as a plant exit—is discounted as it was not she but Borrello who initiated the announcement and he did not give this as a reason. Nor does the other reason advanced by Borrello and supported by Altieri, missing tools, seem to be valid. Thus, I cannot credit Borrello that an employee was responsible for mislaying the tool it took him so long to find inasmuch as the record shows that employees went into the shop for tools when dispatched by Borrello and Altieri. It follows that it was Borrello and Altieri who used the tools and if they were not returned it must have been because Borrello and Altieri failed to return them or to give them to employees for return. If tools were missing,

therefore, it presumably was because of the negligence of Borrello and Altieri and not of the employees. Accordingly, although requiring employees to stop at the door of the shop and ask Rosenquist for tools might have resulted in Rosenquist's knowing who took them, it would not have cured the problem of not having them returned. Moreover, although Borrello's explanation that it was not economical to employ Rosenquist at unskilled duties makes a certain amount of sense, his flat restriction on Rosenquist's movements seemed to apply also to his mechanic work on the floor which, though perhaps infrequent, was an economical use of Rosenquist's time. It is also significant that Borrello completely failed to account for the timing of this proclaimed restriction.

As the reasons advanced by the Respondent are without merit, and in view of the timing of the announcement within an hour or so of the confirmation of Borrello's information that Rosenquist was attempting to organize the employees, the evidence that the rule had previously been unobserved and unenforced, and the union animus revealed by both Borrello and Gutierrez herein-after described, I find, notwithstanding Borrello's knowledge that Rosenquist had been a member of the Union at his prior place of employment, that Borrello's purpose in making this announcement was to isolate Rosenquist from the other employees, and thus interfere with employees' organizational activities. Even though the Respondent apparently did not follow up with any enforcement, I find that the announcement in itself tended to inhibit the employees in the exercise of their rights under Section 7 of the Act, and I conclude that the announced isolation of Rosenquist from the other employees violated Section 8(a)(1) of the Act, substantially as alleged in the complaint.⁴

2. The complaint alleges that on August 10 President Gutierrez threatened employees with plant closure and discharge if they did not refrain from engaging in union activity.

On August 10, the union representatives distributed campaign literature at the plant gate. Donna Reuther, a packer in the Respondent's employ, testified that at about 4 p.m. that day she heard Gutierrez say that:

Unions had ruined [her country] Cuba and . . . it was her right as an American citizen, not to have a Union in her place. She would rather close her doors and move to another town, than to have a Union in her plant.

Gutierrez admitted making these remarks, her defense being as she recalled she was angry and upset at the time because she had just seen Rosenquist place a union pamphlet in her car and not being familiar with American labor laws she did not know it was unlawful to say such a thing.

I am willing to believe Gutierrez' testimony and to accept her counsel's argument that she is sorry she made the remark. However, anger, ignorance of the law, and regret are not really relevant. The test is whether the

⁴ Cf. *Stein Seal Company*, 237 NLRB 996 (1978); *S. S. Kresge Company*, 229 NLRB 10, 17 (1977).

remark can reasonably be said to have restrained and coerced her employees in the exercise of their rights under Section 7 of the Act.⁵ Both the Supreme Court⁶ and the Board⁷ have held that a threat to close a plant does restrain and coerce employees.

I conclude that President Gutierrez' statement of August 10 violated Section 8(a)(1) of the Act.

3. The complaint alleges that on August 21, 1979, President Gutierrez promised to improve hospitalization and other benefits if employees refrained from union activity, solicited grievances with an implied promise to remedy them, and set up a grievance committee in order to induce employees to refrain from union activity.

On August 21, some of the employees informed Gutierrez they wished to attend a meeting with the union representatives; she ordered the machine shut down 15 or 20 minutes early and urged all to attend the meeting. At the meeting, held in a nearby restaurant, the union representatives discussed hospitalization, life insurance, and other benefits offered by the Union, and the grievance procedure which would be proposed. The discussion was fully reported to President Gutierrez.

The next day, August 22, Gutierrez joined a group of employees in the lunch area during breake time and told them it was true she did not have a good health plan but she would try to improve it; she had been trying to get a better plan for a long time; and if the employees would contribute \$11 a month instead of giving that amount to the Union, she would contribute the same amount, and obtain better coverage.⁸ It was then suggested by one or more of the employees that they elect a committee to take employee problems to Gutierrez and Borrello, and Gutierrez told them it would be all right.⁹

With regard to the medical plan, the record establishes that Gutierrez had sought to improve the plan in effect at the plant since January 1979, obtaining quotations from various insurance companies, and discussing the quotations with employees known to be interested because they were covered by the present plan.¹⁰

Even though it is clear that Gutierrez encouraged the employees to attend the union meeting of August 21, and even though, to the employees' knowledge, she had been searching for an improved medical-insurance plan, her statement to them on August 22 was plainly prompted

by the union representatives' description of their plan and put to the employees in terms suggesting that improvement in the company plan was contingent upon the employees' forgoing unionization and the dues obligations associated therewith. In other words, the reasonable inference to be drawn by the employees was that the Respondent would improve its medical-insurance plan if the employees would abandon the Union and use the money they would have otherwise paid in dues to the Union to pay their share of the premiums for the new plan. Where, as here, such a promise is made with the intent of influencing employees' attitudes toward unionization, it constitutes interference with employees' rights under Section 7 of the Act.¹¹ Similarly, inasmuch as there had been no grievance procedure in effect at the plant and as the proposal to elect a committee stemmed from the union representatives' presentation of the day before, Gutierrez' agreement to the election of what amounted to a grievance committee was clearly impelled by a desire to induce the employees to forsake the Union in exchange for an improvement in working conditions.¹²

Accordingly, I conclude that on August 22 the Respondent promised to improve medical insurance and to set up a grievance committee in order to induce employees to refrain from engaging in union activity, and thereby violated Section 8(a)(1) of the Act.

4. The complaint alleges that in early December 1979 Dennis Borrello impliedly threatened employees with plant closure if they selected the Union to represent them.

Richard Rosenquist testified, in support of this allegation, that on or about December 1, after he had been recalled to work at the plant, he had a conversation in the shop with Borrello during which Borrello "mentioned that Unions are destroying the country and that a Union would put a small business, like this, under." Borrello's memory of this conversation was admittedly dim and, as he could not flatly deny this testimony, I credit it.

Although Rosenquist acknowledged he has been a friend of Borrello's for a long time and had many conversations with him over the years, the Board has indicated that a remark by supervision to an employee is "no less coercive merely because it comes from a friend."¹³ Similarly, although Rosenquist testified he did not consider Borrello's statement a direct threat, as stated above the test is whether the remark would reasonably restrain and coerce employees. It is well established that an employer can make a prediction as to the precise effect he believes unionization will have on his company, but, if he does, his prediction must be carefully phrased on the basis of objective fact to convey his belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization.¹⁴ I find that Borrello's remark failed to meet this test and conclude that it

⁵ *Florida Steel Corporation*, 224 NLRB 45 (1976).

⁶ *N.L.R.B. v. Gissel Packing Co., Inc., et al.*, 395 U.S. 575, 611, fn. 31 (1969); *Textile Workers Union of America v. Darlington Manufacturing Company, et al.*, 380 U.S. 265, fn. 20 (1965).

⁷ *Plastic Film Products Corp.*, 238 NLRB 135, 137 (1978).

⁸ Based on the credited testimony of employee Donna Reuther, substantially admitted by Gutierrez.

⁹ Based on the credited testimony of Sheila Garcia. I do not credit Reuther's unsupported testimony that it was Gutierrez who suggested the shop committee. Nor can I accept Gutierrez' testimony that she did not understand the shop-committee suggestion, in view of Altieri's testimony that Gutierrez told the employees they could not elect Altieri because "she's working for me and that wouldn't be fair to you . . ." thereby revealing a certain sophistication in the matter.

¹⁰ Based on the mutually corroborative testimony of Gutierrez, employee Elizabeth Peters, and Dianne Altieri. The General Counsel admits the Respondent provided medical coverage, and I discredit Donna Reuther's testimony that the Respondent had no medical-insurance plan at the time. The Respondent obtained an improved medical-insurance plan in February 1980 for the employees and the Respondent continued evenly to divide the cost of the premiums.

¹¹ *N.L.R.B. v. Exchange Parts Company*, 375 U.S. 405 (1964); *Viele & Sons, Inc.*, 227 NLRB 1940, 1944 (1977).

¹² See *First Data Resources, Inc.*, 241 NLRB 713, 722-723 (1979).

¹³ See *Cagle's Inc.*, 234 NLRB 1148, 1150 (1978).

¹⁴ *N.L.R.B. v. Gissel Packing Co., Inc.*, *supra* at 617.

therefore constituted an implied threat to close the plant in the event of unionization, and violated Section 8(a)(1).¹⁵

C. Violation of Section 8(a)(3)

The complaint alleges that the Respondent laid off Richard Rosenquist on August 9, 1979, because of his union activities. The Respondent contends the layoff was economically motivated.

When Rosenquist reported for work on the morning of August 9, Borrello took him into the office and informed him, without any prior warning, that Borrello and Gutierrez had decided the evening before that there was not enough work for him and they had to lay him off.

Borrello testified that he and Gutierrez had discussed for months the possibility of laying Rosenquist off "if we didn't get busy." They discussed it again in mid or late July, he said. Borrello spoke of a big job the Company hoped for falling through but he could not remember when this happened. He did say that when the Company had lost a big customer the preceding December he "went on unemployment myself . . . just so I could hold [Rosenquist] there," but he decided he would never do that again because, "if you're nice you get—it just doesn't pay to be nice." This time, after stretching things out as much as they could, he and Gutierrez decided on the evening of August 8, that they would let Rosenquist go because they would not be building any more machines and he himself would make any parts that were needed.

Gutierrez made no reference to the loss of any big job, but she said that in June she and Borrello had discussed the fact that they had built no machines since December and that business was slow. She decided to lay Rosenquist off, she said, about 10 days after she laid off her own sister whom she employed at the plant, because Rosenquist was unhappy, he complained about his wages and about people stealing tools from the shop, he came late to work, and he and Borrello complained about each other; she also said Rosenquist's wages were high and she did not have the money to pay him, and other employees were more essential.

The salient feature of this testimony is the failure of either management witness to account for the timing of the layoff. Borrello could not date the loss of the big job he referred to and Gutierrez did not even mention that. Both were vague about business being poor, and no documentary evidence was offered. In addition, they claimed to have discussed the possibility of layoff in the past, but never mentioned it to Rosenquist. Moreover, although management described Rosenquist as a valuable employee, no consideration seems to have been given to the possibility of keeping him on the payroll on a part-time basis, making the parts Borrello was required to make, continuing his share of the machine repair work in which there apparently was no diminution, and doing the printing work, instead of hiring a completely inexperienced new employee. Gutierrez' criticisms of Rosenquist's conduct on the job were not corroborated by

Borrello as reasons for the layoff, and were not, in any event, relevant to the Respondent's economic defense to this allegation.¹⁶

As against this, the General Counsel has directly related the timing of the layoff to the day after management learned of Rosenquist's meeting with union representatives, thereby confirming their information that he was attempting to organize the employees. Moreover, the Respondent's union animus was clearly revealed by the immediately preceding announcement of the isolation of Rosenquist and the shortly following threat to close the plant rather than have a union represent its employees. This conduct was followed, less than 2 weeks later, by unlawful promises of benefits to induce employees to abandon the Union, and several months afterwards by another threat to close the plant. The hostility thus demonstrated makes clear that Borrello, in his testimony relating to the layoff "it just doesn't pay to be nice," had Rosenquist's union activity in mind.

Therefore, as the economic reasons advanced by the Respondent are not supported by substantial credible evidence, and in view of the timing of the layoff shortly after the Respondent confirmed its knowledge of Rosenquist's organizing activities, and its hostility to unionism revealed by the other unfair labor practices found, I find that, even though President Gutierrez may not have been aware of its illegality, Rosenquist's layoff was another weapon used in the Respondent's fight against the unionization of its employees. I conclude that the Respondent discriminatorily laid off Richard Rosenquist on August 9, 1979, to discourage union activity, in violation of Section 8(a)(3) of the Act.

II. REMEDY

Having found that the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I recommend that it be ordered to cease and desist therefrom, and from infringing in like or related manner on its employees' exercise of their rights under Section 7 of the Act. I also recommend that the Respondent be ordered to take certain affirmative action necessary to effectuate the policies of the Act. I have found that Richard Rosenquist was discriminatorily discharged on August 9, 1979. As the record shows that Rosenquist was fully reinstated on November 1, 1979, I find it unnecessary to include a reinstatement recommendation. I do, however, recommend that he be made whole for any loss of earnings suffered between the date of his layoff and the date of his reinstatement. Interest shall be paid on all backpay in accordance with *Florida Steel Corporation*, 231 NLRB 651 (1977), and *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

¹⁵ *N.L.R.B. v. Gissel Packing Co., Inc.*, *supra*; *The Stride Rite Corporation*, 228 NLRB 224, 234 (1977).

¹⁶ I find no support for the Respondent's cause in the fact that Rosenquist told the Unemployment Compensation Commission he was laid off for lack of work. Employees commonly, if not invariably, repeat, in their claims for unemployment compensation, the reasons given to them by their employers for their layoffs. Nor is it significant, in determining the cause of layoff, that the Respondent recalled Rosenquist to work on November 1, 1979, after the charge was filed in this case.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER¹⁷

The Respondent, Highland Foods, Inc. and Vickelda Industrial Corporation, Highland, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Laying off or otherwise discriminating against employees to discourage membership in, or support of, Local 5, Butchers, Food Handlers, Allied and Miscellaneous Workers Union, affiliated with United Food & Commercial Workers International Union, AFL-CIO-CLC, or any other union.

(b) Announcing the isolation of employees for the purpose of interfering with union activity, threatening to close the plant if employees do not refrain from union activity, or promising benefits to induce employees to refrain from union activity.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the National Labor Relations Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Make whole Richard Rosenquist for earnings lost by reason of the discrimination against him, between August 9 and November 1, 1979, with interest, in the manner set forth in the remedy section of this Decision.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its plant in Highland, New York, copies of the attached notice marked "Appendix."¹⁸ Copies of the

notice, on forms provided by the Regional Director of Region 3, after being duly signed by an authorized representative of the Respondent, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by said Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 3, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

WE WILL NOT lay off or otherwise discriminate against any employee to discourage membership in or support of Local 5, Butchers, Food Handlers, Allied and Miscellaneous Workers Union, affiliated with United Food & Commercial Workers International Union, AFL-CIO-CLC, or any other union.

WE WILL NOT announce the isolation of employees for the purpose of interfering with union activity, threaten to close the plant if employees do not refrain from union activity, or promise benefits to induce employees to refrain from union activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL make whole Richard Rosenquist for the lost earnings suffered by him between August 9, 1979, when he was discriminatorily laid off, and November 1, 1979, when he was reinstated, with interest.

HIGHLAND FOODS, INC. AND VICKELDA
INDUSTRIAL CORPORATION

¹⁷ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

¹⁸ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by